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Opinion No. 04-019

Drug and Alcohol Testing of Department of Correction Employees

QUESTIONS

1. Is the Tennessee Department of Correction (TDOC) eligible to become a “covered employer” under Tenn. Code Ann. §50-9-101— 112, the drug-free workplace program?
2. Does Tenn. Code Ann. §50-9-101— 112 repeal by implication all provisions of Tenn. Code Ann. §41-1-121, relative to the authority of the TDOC to conduct drug testing of security personnel?
3. Does the TDOC have the state statutory authority to require employees to submit to random drug and alcohol tests?

OPINIONS

1. Yes, the TDOC is eligible to become a “covered employer.”
2. If the TDOC elects to implement a drug-free workplace program in accordance with title 50, chapter 9, it need not comply with Tenn. Code Ann. §41-1-121.
3. If the TDOC does not implement the statutory drug-free workplace program, then Tenn. Code Ann. §41-1-121(b) prohibits drug testing of security personnel in the absence of reasonable suspicion. Provided such testing comports with federal law, all TDOC employees may be tested randomly for alcohol, and all non-security personnel may be tested randomly for drugs.

If the TDOC does implement the drug-free workplace program, employees not in “safety-sensitive positions” as defined in §50-9-103(16) may be required to submit to tests for alcohol only when the test is based upon “reasonable suspicion,” as defined in §50-9-103(15). Tenn. Code Ann. §50-9-104(a). Employees in safety-sensitive positions may only be tested for alcohol use on occasions described in §50-9-106(a)(2)-(5). Provided such testing comports with federal law, TDOC employees may be tested randomly for drugs.

ANALYSIS

Tenn. Code Ann. §41-1-121, passed in 1988, outlines the authority of the Commissioner of Correction to require security personnel to submit to tests for controlled substances and the procedure to be used. Tenn. Code Ann. §§50-9-101 — 112, was passed as part of the Worker's Compensation Reform Act of 1996. The Reform Act provides, in essence, that if a covered employer implements a drug-free workplace program as outlined in the legislation, the employer may require employees to submit to tests for the presence of drugs or alcohol and, under certain circumstances, terminate employees and forfeit their eligibility for workers' compensation benefits if drugs or alcohol are found to be present in the employees' systems. Tenn. Code Ann. §41-1-121 and Tenn. Code Ann. §§50-9-101 — 112 conflict in a number of ways, most particularly that §41-1-121(b) prohibits all drug testing of security personnel not based on reasonable suspicion.

Tenn. Code Ann. §50-9-103(5) defines a “[c]overed employer” as a person or entity that employs a person, is covered by the Workers' Compensation Law, maintains a drug-free workplace pursuant to title 50, chapter 9 and posts a specific statement that the employer's drug/alcohol policy is being implemented pursuant to the provisions of title 50, chapter 9. The chapter has no effect on employers who do not meet this definition. The issue is whether the TDOC is “covered by the Workers' Compensation Law” for the purposes of a statutory drug-free workplace program since the State is only governed by the workers' compensation law to the extent authorized by Tenn. Code Ann. §9-8-307(a)(1)(K). The primary exceptions to the State's workers' compensation law coverage include the second injury fund, insurance requirements, oversight by the department of labor and workforce development, the opt out provisions, and, of course, the forum for determination of claims. These exceptions relate to the State's unique status as a sovereign governmental entity. Since the State has chosen to subject itself to the benefits portions of the Workers' Compensation Law, the TDOC is “covered by the Workers' Compensation Law” for the purposes of the statutory drug-free workplace program. If the TDOC meets the other statutory requirements of Tenn. Code Ann. §50-9-103(5), it would be considered a “covered employer”.

“The cardinal rule of statutory construction is to effectuate legislative intent, with all rules of construction being aides to that end.” *Browder v. Morris*, 975 S.W.2d 308, 311 (Tenn. 1998). Where possible, statutes should be read in harmony. *Frazier v. East Tennessee Baptist Hospital*, 55 S.W.3d 925, 928 (Tenn. 2001). “Statutes relating to the same subject or sharing a common purpose must be construed together (‘in pari materia’) in order to advance their common purpose or intent.” *Id.* Whenever possible, legislative intent is to be ascertained from the natural and ordinary meaning of the language used in the statute. “Where the plain language of a statute does not directly address the issue or leads to an absurd result, however, [the courts] will look beyond the language of the statute and adopt a reasonable construction that provides for harmonious operation of the laws.” *Lipscomb v. Doe*, 32 S.W.3d 840, 844 (Tenn. 2000). Further, when the legislature enacts a new statute covering the entire subject matter of an earlier statute, the court will conclude that one of the purposes of the new statute was to repeal the earlier one. *Pacific Eastern Corp. v. Gulf Life Co.*, 902 S.W.2d 946, 954 (Tenn. App. 1995).

If the TDOC elects to implement a drug-free workplace program in accordance with title 50, chapter 9, it need not comply with Tenn. Code Ann. §41-1-121. Tenn. Code Ann. §50-9-106(a)(3) provides that under certain circumstances public employers may require scheduled, periodic testing of employees who “[w]ork in direct contact with inmates in the custody of the department of correction.” This language evidences a legislative intent for the provisions of title 50, chapter 9 to supersede the provisions of Tenn. Code Ann. §41-1-121, which only authorizes reasonable suspicion drug testing of security personnel, if the TDOC elects to implement the drug-free workplace program.

The final question is whether the TDOC has the authority to require employees to submit to random drug and alcohol tests, assuming that such testing is permitted under federal law. If TDOC does not implement the statutory drug-free workplace program, then Tenn. Code Ann. §41-1-121(b) prohibits drug testing of security personnel in the absence of “reasonable suspicion based upon specific objective facts that the employee’s faculties are impaired on the job, and such impairment presents a clear and present danger to the physical safety of the employee, another employee, or the security of the institution.”

If the TDOC elects to implement the drug-free workplace program in accordance with title 50, chapter 9, employees not in “safety-sensitive positions” as defined in §50-9-103(16) may be required to submit to tests for alcohol only when the test is based upon “reasonable suspicion,” as defined in §50-9-103(15). Tenn. Code Ann. §50-9-104(a). Employees in safety-sensitive positions may only be tested for alcohol use on occasions described in §50-9-106(a)(2)-(5), i.e., job applicant testing, reasonable suspicion testing, routine fitness-for-duty testing, follow-up to treatment testing, and post-accident testing. Tenn. Code Ann. §50-9-104(a). Title 50, chapter 9 does not preclude an employer from conducting any lawful testing for drugs that is in addition to the minimum testing required under the chapter. Tenn. Code Ann. §§50-9-106(b) & 50-9-108(e). Consequently, provided such testing comports with federal law, TDOC employees may be required to submit to random drug tests.

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